INSIDE

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IN FUTURE ISSUES

Decision requiring payments on shared appreciation agreements affirmed

In an action brought by several farmers asserting that they were not obligated to make certain payments under the Shared Appreciation Agreements they entered into with the United States Department of Agriculture ("USDA") and challenging the USDA's determination of the maximum amount that could be collected from them under the Agreements, the United States Court of Appeals for the Eighth Circuit has affirmed a district court's decision to dismiss the farmers' action. *Stahl v. Veneman*, No. 02-2915, (8th Cir. May 6, 2003). *Stahl* is the most recent decision that has been issued in a series of cases dealing with these particular issues. *See Israel v. United States Dep't of Agric.*, 282 F.3d 521 (7th Cir. 2002); *Bukaske v. United States Dep't of Agric.*, 193 F.Supp.2d 1162 (D.S.D. 2002); *Stahl v. Veneman*, No. A3-01-85, 2002 WL 1173556 (D.N.D. May 20, 2002).

The Agricultural Credit Act of 1987 ("ACA"), 101 Stat. 1679 (1988), was enacted so that farmers and ranchers who were delinquent in payments for various agricultural loans could restructure their debts. *Stahl*, No. 02-2915, at *1. These farmers and ranchers were allowed to write-down their secured debts to reflect the market value of the land that secured the agricultural loans they had obtained. *See id.* To receive this write-down, they were required to enter into a Shared Appreciation Agreement ("SAA") with the USDA. *See id.*

The SAA provided, in relevant part, the following:

> As a condition to, and in consideration of, [USDA] writing down the above amount and restructuring the loan, Borrower agrees to pay [USDA] an amount according to one of the following payment schedules:
>
> 1. Seventy-five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security agreement(s) between the date of the Agreement and either the expiration date of this Agreement or the date the Borrower pays the loan in full, ceases or transfers title of the security, if such event occurs four (4) years or less from the date of this Agreement.
>
> 2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays the loan in full, ceases forming or transfers title fo the security, if such event occurs after four (4) years but before the expiration date of this Agreement.

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Pre-revised Article 9 security agreement not effective

In an action brought by two Chapter 12 debtors to determine the status of a creditor's security interest in the debtors' growing crops, the United States Bankruptcy Court for the District of Kansas has ruled that the creditor's interest did not attach to the growing crops because the security agreement did not contain a description of the land on which the crops were growing as required by former Article 9. *In re Stout*, 284 B.R. 511, 515 (Bankr.D.Kan. 2002). Thus, the court ruled that the debtors' estate was entitled to the proceeds of the growing crops that were planted prepetition, free of any of the creditor's claims. *See id.*

Sam and Debra Stout, debtors, filed a Chapter 12 bankruptcy petition on June 4, 2002. *See id.* at 512. The debtors obtained loans from the First National Bank of Sterling, Kansas ("Bank"). *See id.* At the time of the bankruptcy filing, the debtors owed the Bank "not less than $891,161.39." *Id.* This debt was secured by several mortgages and security agreements. *See id.* at 511.

Two of these security agreements applied to the Bank's interest in the debtors' growing crops. *See id.* The agreements were executed on February 26, 1993, and May 2, 2000. *See id.* at 512. Each of the security agreements was "executed and delivered to the Bank prior

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> The amount of recapture by [USDA] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into. If the borrower violates the term of this agreement [USDA] will liquidate after the borrower has been notified of the right to appeal.

Id.

The plaintiff-farmers in this action asserted that the USDA officials with whom they signed the SAA had communicated to them that "if they had not paid the loan in full, sold their land, or quit farming before the expiration date of the agreement, they would owe nothing." *Id.* They brought a declaratory judgment action in federal district court seeking a determination that they owed no money to the USDA under the SAA. *See id.* In the alternative, they argued that they owed an amount that was much lower than what the USDA claimed they owed under the SAA. *See id.* The USDA filed a 12(b)(6) motion to dismiss for failure to state a claim on which relief could be granted. *See id.* It also filed a 12(b)(1) motion to dismiss for lack of jurisdiction. *See id.* The district court granted the USDA's Rule 12(b)(6) motion to dismiss. *See id.* The plaintiffs (hereinafter "appellants") appealed the district court's decision to the Eighth Circuit. *See id.*

The appellants argued that "the district court erred by considering matters outside the pleadings and by refusing to convert the motion to one for summary judgment, thereby denying the appellants an opportunity to conduct discovery or present evidence." *Id.* Noting that the USDA's motions to dismiss were accompanied by six contract documents that pertained to the SAA, it stated that in a contract action such as this courts "may the examine the contract documents in deciding on a motion to dismiss." *Id.* (citations omitted).

The court explained that exhibits one and five were copies of the SAA; exhibit two "was a copy of instructions to farmers regarding the Agreements that had been published in the Code of Federal Regulations"; exhibit four was a copy of a USDA regulation; and that exhibit six was a June, 1989, Administrative Notice issued by the USDA. *Id.* The court stated that because these documents were all public records, the district court did not improperly consider them on a motion to dismiss. *See id.* (citations omitted).

Exhibit three was an affidavit of the Director of Farm Loan Servicing and Property Management Division of the USDA's Farm Service Agency. *See id.* The court stated that although exhibit three was "primarily relevant to the USDA's Rule 12(b)(1) motion to dismiss ..., the affidavit contained a statement that recapture 'is triggered by certain events including expiration of the [Agreement].'" *Id.* The court explained that if the district court considered the affidavit to help interpret the SAA, then exhibit three "would constitute matters outside the pleadings and would require the district court to convert the motion to dismiss into one for summary judgment." *Id.* The court also explained, however, that the district court had "'complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion.'" *Id.* (citations omitted). It ruled that although the district court stated that "it had considered the 'entire file,' these materials were irrelevant to its resolution of the merits of the motion. Consequently, we conclude that the district court did not err in resolving the USDA's motion as one to dismiss rather than as one for summary judgment." *Id.*

The court also rejected the appellants' argument that they owed no recapture amount under the SAA if the SAA expiration date was reached without any of the triggering events having occurred. *See id.* The triggering events were the farmers' conveyance of the secured property, the farmers' repayment of the loans, or the farmers' ceasing of farming operations. *See id.* (citing 7 U.S.C. § 2001(e)(4)(A)-(c)). The court stated that

> [A]lthough we agree with the USDA's construction of the statute, on this point we find it unambiguous. Subsection (e)(4) states that "[r]ecapture shall take place at the end of the term of the agreement." Although Congress afforded the Secretary deference in determining whether to require the borrow to enter into a shared appreciation agreement ..., the terms governing recapture are mandatory .... To the extent that the Agreement is ambiguous or that representations made by the USDA county supervisors suggest that no recapture is due at the end of the term, the mandatory provisions of the statute control.

Id. (citations omitted).

Finally, the court rejected the appellants' alternative argument that "the amount of any recapture due under the Agreement is limited to a value labeled the 'Equity of Recapture Amount' . . . which was attached to the Agreement and a copy of which was given to the borrower." *Id.* The court explained that § 2001(e)(3) "unambiguously

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Security agreement/C*ont. from p. 1*

to July 1, 2001, the effective date of the revised Article 9 of the Kansas Uniform Commercial Code." *Id.* at 511. Neither of these agreements complied with the attachment requirements contained in former Kan. Stat. Ann. § 84-9-203 (1996) because they failed to describe the land on which the crops were growing. *See id.* at 512.

Former Article 9 provided that "'a security interest is not enforceable against the debtor or third parties with respect to the collateral and *does not attach* unless'" the debtor signed the agreement which adequately described the collateral, value was given for the collateral, and the debtor had rights in the collateral. *Id.* (quoting § 84-9-203(1) (1996)) (emphasis supplied). Former Article 9 also required a security agreement that covered "crops growing or to be grown" to include "a description of the land on which they are grown." *Id.* (citing § 84-9-203(1)(a) (1996)).

Under revised Article 9 a legal description of the land is no longer required for a security interest that covers "crops growing or to be grown." *See id.* Revised Article 9 also states that a "'security interest attaches to collateral when it becomes enforceable against the debtor with respect to collateral, unless an agreement expressly postpones the time of attachment.'" *Id.*

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VOL. 20, NO. 6, WHOLE NO. 235 May 2003

AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail:
lgmccormick@academicplanet.com

Contributing Editors: Harrison M. Pittman, University of Arkansas, Fayetteville, AR; Brandy L. Brown, University of Arkansas, Fayetteville, AR; Anne Hazlett, Washington, D.C.

For AALA membership information, contact Donna French Dunn, Executive Director, 4115 South Duff Avenue, Suite C, Ames, IA 50010-6600. Phone: (515) 956-4255.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

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specifies" that seventy-five percent "of the appreciated value of the property is due if recapture occurs within four years of the write-down, and fifty percent is due thereafter." *Id.* (citing 7 U.S.C. § 2001(e)(3)). It also explained that the SAA does not indicate in any way that recapture was limited to the Equity Recapture Account Amount. *See id.* "Rather the Agreement is consistent with the requirements of § 2001." *Id.*

The Eighth Circuit concluded that

> [A]lthough we agree with the appellants that the Agreement does not represent the pinnacle of the drafter's art ..., its terms are reasonably plain and in any case may not be construed to conflict with the conditions Congress has placed on participation in this program. We conclude that 7 U.S.C. § 2001unambiguously requires recapture of fifty percent of the appreciated value of the property securing the loan upon the expiration date of the Agreement. Because appellants' asserted construction of the Agreement is inconsistent with the requirements of § 2001, we find no error in the district court's dismissal of their claims.

Id.

—Harrison M. Pittman, Staff Attorney

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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Pork contractor's control over feedlot sufficient to deny motion to dismiss

In an action brought by three plaintiffs against the owners of a pig feedlot and the contractor that supplied pigs to the feedlot for nuisance, negligence, trespass, and violations of the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. § 116B.01, the United States District Court for the District of Minnesota has denied the contractor's motion to dismiss the plaintiffs' claims for nuisance, negligence, and trespass because the contractor had sufficient control over the feedlot to sustain those claims. *Overgaard v. Rock County Board of Commissioners*, No. 02-601, 2002 WL 31924522 (D. Minn. Dec. 30, 2002). It granted the contractor's motion to dismiss the plaintiffs' claim that it had violated the MERA because the plaintiffs failed to comply with the necessary procedures for bringing a claim under the MERA. *See id.* at *4.

Glenn Overgaard, Mabel Overgaard, and Loren Overgaard, plaintiffs, lived in Rock County, Minnesota and owned land adjacent to a pig feedlot operated on land owned by Scott Overgaard and Chad Overgaard, defendants. *See id.* at *1. Scott and Chad were part owners of the feedlot, known as Overgaard Pork, which was a Minnesota general partnership. *See id.* Schwartz Farms, Inc. ("Schwartz "), also a defendant, was a Minnesota corporation that owned the pigs grown on the Overgaard Pork feedlot. *See id.* The plaintiffs' action against the defendants was based on nuisance, trespass, negligence, and violations of the Minnesota Environmental Rights Act ("MERA"), Minn. Stat. § 116B.01. *See id.*

Schwartz signed an "Independent Contractor Agreement" with Overgaard Pork, Scott and Anita Overgaard, husband and wife, and Chad and Carrie Overgaard, also husband and wife. *See id.* Under this agreement, Schwartz retained control over various functions of the Overgaard Pork feedlot operation. *See id.* In particular, Schwartz "retained ownership of the pigs throughout their stay at the Overgaard feedlot, specified the housing construction on the Overgaard Pork feedlot, and directed Overgaard Pork's daily maintenance of the pigs (including the pigs' sorting, feeding, cleaning, and disposal)." *Id.*

Schwartz also entered into an "Easement/Assignment" with Overgaard Pork, Scott and Anita Overgaard, and Chad and Carrie Overgaard that provided Schwartz ingress and egress rights to the feedlot land. *See id.* The "Easement/Agreement" also provided that

> [G]rowers and Owners [Overgaard Pork, Scott and Anita Overgaard, and Chad and Carrie Overgaard] hereby grants to Schwartz an odor and air quality easement over the Property. For the term of the easement, Grower and Owners waive any claim they may have against Schwartz based on odor from the Facility Site or based on exceedances of state ambient air quality emission standards arising from the operation and use of the Facility Site. This Easement/Agreement remains in effect until July 2006, five years after the agreement was signed.

Id. at *1-2.

The plaintiffs alleged that "[b]ased upon Schwartz Farms' relationship with Scott and Chad Overgaard and Overgaard Pork . . . that Schwartz Farms contributed to the alleged air emissions and water contamination related to [the] [p]laintiffs' assertions of negligence, nuisance, trespass, and MERA violations." *Id.* at *2. Schwartz Farms filed a motion to dismiss. *See id.*

With respect to the nuisance and negligence claims, Schwartz argued that the plaintiffs "have not made any factual allegations that tie Schwartz Farms to any wrongful conduct that caused the alleged harm to the [p]laintiffs, because [it] merely owns the pigs on the Overgaard Pork feedlot and has not created a nuisance or acted negligently." *Id.* Under Minnesota law,

> [a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so

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*Security agreement**Cont. from p. 1*
(quoting Kan. Stat. Ann. § 84-9-203(a) (Supp. 2001)).

Thus, if the Bank had executed its security agreements covering the debtors' growing crops after July 1, 2001, the agreements would be sufficient to attach to the debtors' crops and, absent some other defect in the agreements, the debtors' bankruptcy filing would not affect the validity or perfection of the liens created by the agreements. *See id.* However, because the Bank executed its agreements prior to July 1, 2002, and because the Bank failed to comply with the requirements of former Article 9, the parties stipulated that the Bank's security interest did not attach the debtors' growing crops. *See id.* The parties also agreed that without the enactment of Revised Article 9, the Bank's security interest would be unenforceable against the debtors. *See id.*

Therefore, the central issue before the bankruptcy court was "whether a security interest which did not attach prior to the enactment of revised Article 9 can be 'saved' by that enactment." *Id.* The Bank contended that its defective security agreement could be saved by the enactment of revised Article 9. *See id.* The Bank argued that revised Article 9 cured any defects in its security agreements and allowed their security interests to attach upon its enactment. *See id.* The Bank asserted that had their security agreements been filed after July 1, 2001, their security agreements would have attached and would have been perfected. *See id.* Therefore, the Bank reasoned that since the security agreements now meet the requirements of revised Article 9, they should be saved and that their security interests should have priority over the debtors as lien creditors. *See id.*

The court stated that having found "virtually no scholarship or case law on this point (and being cited none), the Court is left to a careful study of the statutory language, and, in particular, the transitional rules found in Part 7 of Article 9, [Kan. Stat. Ann] § 84-9-701 (Supp. 2001), et seq." *Id.* at 512-13. First, the bankruptcy court ex-

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Commodity promotion update: "got milk?"® campaign survives constitutional challenge

By Anne Hazlett

In March, federal district courts in Pennsylvania and Washington rendered decisions in the latest set of cases challenging the constitutionality of generic promotion, or "check-off," programs. Last month's article reviewed *In re Washington State Apple Advertising Commission*, 2003 WL 1900705 (E.D. Wash. March 31, 2003), a ruling by the United States District Court for the Eastern District of Washington striking down assessments to fund the well-known Washington Apple advertising campaign as an unconstitutional restriction on the right to free speech. By contrast, one week earlier, the Middle District of Pennsylvania upheld the Milk Moustache/got milk?® campaign against a similar challenge. *Cochran, et al. v. Veneman*, 2003 U.S. Dist. LEXIS 4361 (M.D. Penn. March 24, 2003). This story examines the *Cochran* decision and considers what the two cases mean for the future of commodity promotion.

***Cochran*: background**

In 1983, Congress created the Dairy Promotion and Research Program, 7 U.S.C. §§ 4501 *et seq.*, as part of the Dairy Promotion Stabilization Act. *Id.* at 8-9. In so doing, Congress found that "dairy products are basic foods that are a valuable part of the human diet," that "the production of dairy products plays a significant role in the Nation's economy," that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using and producing dairy products, as well as to the general economy of the Nation." *Id.* at 8 (quoting 7 U.S.C. §§ 4501(a)(1)-(4)). Congress then declared:

> [I]t is in the public interest to authorize the establishment, through the exercise of powers provided therein, of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

2003 U.S. Dist. LEXIS 4361 at 9 (quoting 7 U.S.C. § 4501(b)).

Following guidelines laid out in the statute, the Secretary of Agriculture ("Secretary") issued an order creating the National Dairy Promotion and Research Board ("Dairy Board"). 2003 U.S. Dist. LEXIS 4361 at 9. At present, the Dairy Board has thirty-six members who are milk producers appointed by the Secretary. *Id.* Its powers, which are enumerated within the Stabilization Act, include the authority "to administer the provisions of [the Dairy Order] in accordance with its terms and conditions" and the power to "receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals." *Id.* at 10 (quoting 7 U.S.C. §§ 4504(c)(1)-(2)).

The Stabilization Act states that the Dairy Board will "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes." 2003 U.S. Dist. LEXIS 4361 at 10-11 (quoting 7 U.S.C. § 4505(a)). Any advertising developed by the Dairy Board is subject to the approval of the Agricultural Marketing Service ("AMS") within the Department of Agriculture. 2003 U.S. Dist. LEXIS 4361 at 11.

To fund any advertising campaigns developed by the Board, § 4504(g) of the Stabilization Act authorizes the collection of assessments from milk producers to be paid thereafter to the Dairy Board. *Id.* The Secretary issued an order requiring producers of milk to pay an assessment to the Board of 15 cents per hundredweight of milk marketed commercially. *Id.* at 13. The Dairy Board is then empowered to use funds collected through the assessments in order to fulfill its obligations under the Act. *Id.*

Following its creation, the Dairy Board joined with the United Dairy Industry Association ("UDIA") to create Dairy Management Inc. ("DMI"). *Id.* at 13-14. The Board and UDIA develop their marketing plans and programs through DMI. *Id.* at 14. The DMI Board is composed of dairy farmers from the Dairy Board and UDIA Board. *Id.* Any advertising created by DMI is subject to the approval of AMS prior to its dissemination to the public. *Id.*

In 2000, DMI's program of generic promotion included a full year of fluid milk print advertising from the Milk Moustache/got milk?® campaign. *Id.* at n. 2. On April 2, 2002, Joe and Brenda Cochran, dairy farmers from Westfield, Pennsylvania, filed suit seeking an end to the mandatory fees funding these communications. [1] *Id.* at 15. The Cochrans, who milk 150 cows on a 200-acre farm, object to the generic promotion of milk because such speech denies that there is any difference between milk produced in modern, concentrated operations and milk produced using "traditional farming methods." *Id.* They believe "that the use of sustainable agriculture in the form of a less intensive herd management and grazing system makes for superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet."[2] *Id.* at 16.

On June 6, 2002, the Cochrans filed a motion for summary judgment. *Id.* at 3. They sought a declaratory judgment ruling that § 4504(g) of the Dairy Promotion Program is an unconstitutional restriction on their right to free speech. *Id.* at 2. They also requested an injunction against the Secretary and the Dairy Board enjoining the continued collection of dairy check-off assessments. *Id.* On June 14, 2002, the government filed a motion to dismiss, or in the alternative, for summary judgment. *Id.* at 3. Thereafter, on January 13, 2003, the court granted a petition to intervene from seven dairy producers who, unlike the Cochrans, support the dairy check-off provisions at issue. *Id.* at 4. One week later, the intervening parties filed their own motion for summary judgment. *Id.*

Oral argument was held on each of the summary judgment motions on March 19, 2003. *Id.* Five days later, the court granted summary judgment in favor of the government and intervening parties. *Id.* at 27.

***Cochran*: analysis**

In determining whether the assessments for generic milk promotion violate the First Amendment, the court began its analysis with a determination of whether the facts in this case more closely parallel those in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), or *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). *Id.* at 16. In *Glickman*, producers of California nectarines, plums, and peaches, collectively referred to as "tree fruits," challenged the constitutionality of assessments imposed to cover the costs associated with the state's marketing order, including generic advertising. *Id.* at 16-17. The United States Supreme Court framed the issue before it as follows: "whether being compelled to fund this advertising raises a First Amendment issue... to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Id.* at 17

Anne Hazlett is an associate counsel with the House Agriculture Committee in Washington, D.C.

(quoting *Glickman*, 521 U.S. at 468).

Deciding on the latter, the Supreme Court gave substantial weight to the fact that:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

2003 U.S. Dist. LEXIS 4361 at 17 (quoting *Glickman*, 521 U.S. at 469). The Court then set out three critical characteristics of the marketing orders in effect for the tree fruit producers: "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." 2003 U.S. Dist. LEXIS 4361 at 17-18 (quoting *Glickman*, 521 U.S. at 469-70). On this foundation, the Supreme Court concluded that the assessments issued to fund marketing order activities would be properly reviewed under the standard appropriate for economic regulations, not the heightened scrutiny applicable to First Amendment concerns. 2003 U.S. Dist. LEXIS 4361 at 18 (quoting *Glickman*, 521 U.S. at 469-70).

In *United Foods*, the Supreme Court considered a similar challenge to the constitutionality of assessments on handlers of fresh mushrooms to fund advertising for their products. 2003 U.S. Dist. LEXIS 4361 at 18. Concluding that such collections violated the First Amendment, the Court distinguished the facts from those in *Glickman* as follows: "In [*Glickman*], the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." *Id.* at 18-19 (quoting *United Foods*, 533 U.S. at 411-12). More specifically, the Court determined that there were no marketing orders in place regulating the production and sale of mushrooms, no exemption protected mushroom producers from antitrust laws, and no restrictions limited the ability of individual mushroom producers to make their own marketing decisions. 2003 U.S. Dist. LEXIS 4361 at 19. To the contrary, the only regulations affecting mushroom producers were the mandatory assessments instituted to fund generic advertising at issue. *Id.*

From this review, the court in this case held that § 4504(g) of the Stabilization Act, the statutory provision authorizing the collection of assessments for dairy promotion, is part of a larger regulatory scheme affecting the sale and production of milk. *Id.* at 21. In reaching this conclusion, the court quoted a legislative report that asserted that "federal programs have been deeply imbedded in the economic fabric of the United States dairy industry" since the late 1930s. *Id.* at 7 (quoting S. Rep. No. 98-163, 13, as reprinted in 1983 U.S.C.C.A.N. 1658, 1670). It then explained that the regulatory system, of which dairy check-off assessments are a central part, includes four interrelated federal programs:

> (1) The dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices,
>
> (2) The milk marketing order program which establishes minimum prices for fluid grade milk in most parts of the country,
>
> (3) Import controls which protect the price support program and keep the U.S. government from supporting world milk prices, and
>
> (4) Federal cooperative policy which encourages the development of farmer-owned cooperatives but provides they may not use their market power to raise prices excessively.

Id. From these restrictions, the court found that milk producers are regulated to a similar degree as the tree fruit growers in *Glickman* and that "the mandated assessments for speech [are] ancillary to a more comprehensive program restricting marketing autonomy." 2003 U.S. Dist. LEXIS 4361 at 21 (quoting *United Foods*, 533 U.S. at 411). Accordingly, it devoted the remainder of its analysis to determining whether or not § 4504(g) passes the three-part test set out by the Supreme Court in *Glickman*.

Whether § 4504(g) imposes a restraint on the freedom to communicate

In summary fashion, the court stated that neither § 4504(g) of the Stabilization Act, nor any other provision of the statute, imposes a restraint on the ability of the Cochrans or any other milk producer to communicate any message they desire to any audience. 2003 U.S. Dist. LEXIS 4361 at 22. The mere fact that the assessments imposed by § 4504(g) may indirectly limit an individual producer's ability to advertise by reducing his or her communications budget does not itself amount to a restriction on speech. *Id.* (quoting *Glickman*, 521 U.S. at 470).

Whether § 4504(g) compels any person to engage in actual or symbolic speech

Similarly, the court concluded that § 4504(g) does not compel the Cochrans to engage in any actual or symbolic speech. 2003 U.S. Dist. LEXIS 4361 at 22-23. Relying on the Supreme Court's instruction in *Glickman*, the court explained that the mandatory assessments charged to the Cochrans and other milk producers are not "compelled speech" despite being used to subsidize the generic advertising of milk. *Id.* at 23. In *Glickman*, the Supreme Court held that generic advertising funded through a check-off is not compelled speech because the assessments do not "require [the objecting producers] to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Id.* at n. 8 (quoting *Glickman*, 521 U.S. 470-71). Further, the court noted that the generic advertisements at issue in this case are attributed to the Dairy Board rather than to the Cochrans or any other individual dairy producers. 2003 U.S. Dist. LEXIS 4361 at 23.

Whether § 4504(g) compels dairy producers to endorse or finance any political or ideological views

Lastly, the court held that § 4504(g) does not compel the Cochrans to finance ideological views in violation of the First Amendment. *Id.* at 25. In so doing, the court explained that assessments to fund a lawful collective program may be used to pay for ideological speech over the objection of some members of a group where the advertising funded by those assessments is "germane to the purposes for which compelled association [is] justified." *Id.* (quoting *Glickman*, 521 U.S. at 473). Here, the Cochrans are obligated to finance advertisements that contain messages to which they object because the speech "denies that there is any difference in milk." 2003 U.S. Dist. LEXIS 4361 at 24. Finding that these communications are germane to the purpose for which the Cochrans are forced to associate with other dairy producers, the court stated that the Stabilization Act was created to develop "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products." *Id.* at 25 (quoting 7 U.S.C. § 4501(b)). As generic advertising is intended to stimulate consumer demand for an agricultural product, there can be no doubt that if the relevant communication is effective in increasing demand for milk, it will have furthered the articulated objectives of the Act. 2003 U.S. Dist. LEXIS 4361 at 25. The creation of a generic advertising campaign for milk is germane to the declared purposes of the Stabilization Act. *Id.*

From the foregoing analysis, the court concluded that § 4504(g) of the Stabilization Act is a species of economic regulation that does not infringe upon the Cochrans' right to free speech under the First Amendment. *Id.* at 27.

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Commodity promotion update/Cont. from page 5

Apples and milk: implications for the future

The Supreme Court's decision in *United Foods* has prompted an eruption of suits challenging the constitutionality of check-off programs for other commodities. At present, there are judicial actions threatening the future of ten of the sixteen generic promotion programs authorized by federal law.[3] Most notable in this litigation are challenges to the pork and beef promotion programs that are currently pending before the Sixth and Eighth Circuits and will be decided later this year.[4]

In this time of uncertainty, what do the apple and milk cases contribute to the body of decisions governing the future of commodity check-off programs? First, the Eastern District of Washington's decision in the *Washington Apple* matter is an additional illustration of the difficulty in making a successful government speech argument in these cases. There, the Washington State Apple Advertising Commission was created in statute and given the power to administer and enforce the provisions of the chapter of law creating it. *Washington Apple*, 2003 WL 1900705 at 1. The Director of the Washington Department of Agriculture was an ex officio member of the Commission. *Id.* And, the Commission was subject to an annual audit by the state auditor, to the Open and Public Meetings Act, and to the Washington Administrative Procedures Act. *Id.* at 2.

Nevertheless, like the district courts reviewing challenges to the beef and pork programs, the court rejected the Commission's assertion that its communications were government speech protected from constitutional scrutiny. The court found that the Commission was not a government entity because its funding came exclusively from the assessments at issue, its members had to be apple growers or dealers, and it lacked the authority to prevent and restrain violations of its governing law. *Id.* at 7. Moreover, the Commission was not charged to speak for the Washington state government as the State had no oversight over Commission communications and the Director of Agriculture's position on the Commission Board did not grant the authority to vote in or veto its decisions. *Id.* at 8. This case further clarifies that government creation, characteristics, and subsequent involvement with the workings of the Commission are not enough to translate the program's communication into government speech as that term has been interpreted by the federal courts. Rather, the state must retain authority to edit, change, or censor the Commission's speech in order for a generic promotion message to fit within the government speech doctrine.

Second, the *Washington Apple* and *Cochran* decisions offer greater insight into the types of cases which fit within the Supreme Court's ruling in *Glickman* that certain generic promotion assessments are more properly reviewed as economic regulation than restrictions on speech. At one end of the spectrum, the dairy case involved an industry in which the promotion assessments were only one piece of four interrelated programs designed to address problems with instability in milk prices and dairy farm income. As such, the dairy check-off is more obviously parallel with the California tree fruit program in *Glickman* than with the mushroom program found to be unconstitutional in *United Foods*. In delineating the opposite end of such a continuum, the court in *Washington Apple* instructed that only an economic-based regulatory scheme can fit within the *Glickman* ruling. *Id.* at 11. In that case, the apple industry was saddled with significant restrictions on a variety of production and processing practices such as chemical applications and pack standards. *Id.* Yet, the court held that the program was not within the confines of *Glickman* because such regulation did not restrict the freedom of individual members to market their products. *Id*.

Third, *Washington Apple* raises greater doubt as to the applicability of commercial speech arguments in generic promotion cases. After considering the Supreme Court's rulings in *Glickman* and *United Foods* on the question of commercial speech protection, the court held that affording First Amendment protection to a commercial expression presupposes that the speech is being restricted. *Id.* at 13. And, in the typical fact pattern presented by challenges to a commodity check-off program, the plaintiff's speech is being compelled, not restricted. *Id.*

Lastly, the apple decision presents an interesting fact scenario to watch for in the future of commodity promotion programs. In that case, it was the Commission itself who initiated the suit to eliminate concerns about the certainty of its future following the *United Foods* decision. As a growing number of generic promotion challenges are being resolved against the interests of the promoting body, a larger number of commodities may elect to resolve any uncertainties about the constitutionality of their promotion programs on their own dime and under their own timeframe instead of waiting for a minority element of their industry to file suit. Arguably, however, the outcome of such an action may not be what the promotional interests hope for as seen in the *Washington Apple* case where the Commission has now closed its doors as a result of the court's ruling.

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[1] The Cochrans' suit is being funded by the Center for Individual Freedom, an Arlington, Virginia based group. Frederic Frommer, "Pennsylvania Farmers Tired of Paying for 'Got Milk' Promotions," The News-Sentinel, Apr. 2, 2002, http://www.fortwayne.com/mld/newssentinel/2980241.htm. In an interview, Eric Schippers, executive director for the organization, stated: "The First Amendment affords someone the right to speech, and also the right not to speak." *Id.*

[2] In an interview with the Associated Press, Joe Cochran explained: "We try to follow the old practices, as opposed to the more modern concentrated operations. We have the cows spread out— a little more space, a little more freedom and a little more sunshine." *Id.* Frommer, "Pennsylvania Farmers Tired of Paying for 'Got Milk' Promotions." The Cochrans pay approximately $3500 per year in promotion fees. *Id.*

[3] According to AMS, there are cases pending against the tree fruit, beef, dairy, pork, honey, egg, avocado, watermelon, apple and table grape programs.

[4] Oral argument in one of the beef program challenges, *Livestock Mktg. Ass'n v. USDA*, 2002 U.S. Dist. LEXIS 11625 (D. S.D. June 21, 2002), was heard before the Eighth Circuit Court of Appeals on March 10, 2003. Oral argument in the pork check-off challenge, *Michigan Pork Producers, et al. v. Ann Veneman*, 2002 U.S. Dist. Lexis 20865 (W.D. Mich., October 25, 2002), was heard before the Sixth Circuit Court of Appeals on March 14, 2003.

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> as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Id. at *3 (citing Minn. Stat. § 561.01).

The court noted that Schwartz owned the pigs located at the Overgaard Pork feedlot and that the plaintiffs had alleged "that Schwartz Farms has retained sole control over many of the management and maintenance functions over the pigs at the feedlot." *Id.* It also noted that the "Independent Contractor Agreement" the parties entered into "fully describes the nature of Schwartz Farms' control, including detailed requirements related to the construction of the building and the maintenance of the pigs." *Id.* The court stated that the plaintiffs' claims for nuisance and negligence

> are founded upon the alleged odor, chemical emissions, and water pollution that [p]laintiffs contend to have occurred as a result of the construction, design, and maintenance of the Overgaard Pork feedlot operations. Plaintiffs have established that Schwartz Farms played a significant role in the construction, design, and ongoing maintenance of the Overgaard Pork feedlot. Based upon Schwartz Farms' control over the Overgaard Pork Feedlot, [p]laintiffs' complaint is sufficient to sustain a cause of action against Schwartz

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Farms.

Id.

Next, the court considered Schwartz's motion to dismiss with respect to the plaintiffs' claim for trespass. *See id.* The court explained that "'[t]respass encompasses any unlawful interference with one's person, property, or rights, and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant.'" *Id.* (citations omitted). It added that "'[t]respass is not limited to human entry and can include 'throwing or placing an object upon the property of another.'" *Id.* (citations omitted).

The court noted that the plaintiffs alleged, in part, that odor, chemicals, and water pollution were emitted from the feedlot operations, which resulted in damage to the plaintiffs' property. *See id.* It added that

> [s]uch odor, emissions, and pollution allegedly were caused by the maintenance and operation of the feedlot that Schwartz Farms controlled and designed. While it is not clear to the Court that odor alone could result in a trespass claim, the alleged emissions and pollution could constitute an unlawful entry onto [p]laintiffs' land, thus sustaining an action for trespass under Minnesota law.

Id.

Finally, the court considered Schwartz's argument that because it was a "family farm corporation" it was exempt from being sued under the MERA. *See id.* at *4. The court rejected this argument, stating that without further discovery it could not conclude that Schwartz was a "family farm corporation" and therefore exempt from actions brought under the MERA. *See id.* The court ruled, however, that it did not have jurisdiction to decide the MERA claim because the plaintiffs failed to "serve a copy of the Summons and Complaint upon the Minnesota Attorney General within seven days to allow the State of Minnesota an opportunity to intervene," and failed to "publish notice of the action within 21 days as required by the statute." *Id.* (citations omitted). Therefore, the court granted Schwartz's motion to dismiss the plaintiffs' claim that it had violated the MERA. *See id.*

— Harrison M. Pittman, Staff Attorney

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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plained that the debtors became lien creditors with respect to their bankruptcy estate on June 4, 2002. *See id.* at 513. The court reasoned that the debtors became debtors in possession of the assets of the estate when they filed their bankruptcy petition. *See id.* "As such, the debtors [stood] in the position of a chapter 11 trustee and, as debtors in possession, they [were] lien creditors under the Kansas Uniform Commercial Code." *Id.*

The court stated that "[i]f the Bank's security agreements were valid and enforceable as of the effective date of revised § 84-9-203, the Bank's interests would take priority over those of a lien creditor." *Id.* Under Kan. St. Ann. § 84-9-317(a)(2), "[a] lien creditor that acquires its interest in the collateral before a security interest becomes perfected takes priority over the secured party." *Id.* The court explained that "[a] lien creditor that acquires its interest in the collateral before a security interest becomes perfected takes priority over the secured party." *Id.* (citing § 84-9-317(a)(2)). Noting that the debtors did not acquire their status as a lien creditor until June 4, 2002, "well after the effective date of the Article 9 revision ... which is arguably the earliest that the Bank's liens could have attached to the crops," the court explained that the only remaining question was whether the Bank's liens were "'saved' [by one of the transitional rules] and attached upon the enactment of revised § 84-9-203." *Id.*

The first transitional rule that the court examined was § 84-9-702(a). *See id.* Section 84-9-702 provides that "'this act applies to a transaction or lien within in its scope, even if the transaction or lien was entered into or created before this act takes effect.'" *Id.* (quoting § 84-9-702(a) (Supp. 2001)). Section 84-9-702 also provides that a valid transaction that was not governed by former Article 9 remains valid under revised Article 9. *See id.* (citing § 84-9-702(b)). The court stated that this provision was "telling ... in that it amply provides for the numerous classes of transactions which were formerly beyond the scope of Article 9, but makes no provision whatever for the curing of faulty pre-enactment Article 9 transactions." *Id.* The court determined that while § 84-9-702 could arguably render the Bank's security agreements enforceable and valid, "the other transition rules suggest that, while faulty pre-enactment perfection is remediable, failed pre-enactment attachment is not."

The next transitional rule that the court examined was § 84-9-703 (Supp. 2001). *See id.* at 514. Section 84-9-703 provides that

> [a] security interest *that is enforceable immediately before this act takes effect* and would have priority over the rights of a person that becomes a lien creditor at that time is a perfected security interest under this act if, when this act takes effect, the applicable requirements for enforceability and perfection under this act are satisfied without further action.

Id. (quoting § 84-9-703(a)) (emphasis supplied).

The court also examined the transitional rule provided in § 84-9-703(b). That rule applies to a security interest that is enforceable under former Article 9, but not enforceable under revised Article 9. *See id.* Under § 84-9-703(b) the holder of a security interest has a grace period of one year in which the holder "must meet the applicable enforceability and perfection requirements in order to preserve the security interest's priority over a lien creditor." *Id.* (citing § 84-9-703(b)).

Finally, the court examined § 84-9-704. *See id.* Section 84-9-704 provides that

> A security interest *that is enforceable immediately before this act takes effect* but which would be subordinate to the rights of a person that becomes a lien creditor at that time:
> (1) *Remains an enforceable security interest* for one year after this act takes effect;
> (2) remains enforceable thereafter if the security interest becomes enforceable . . . when this act takes effect or within one year thereafter; and
> (3) becomes perfected:
> (A) Without further action, when this act takes effect if the applicable requirements for perfection under this act are satisfied before or at that time; or
> (B) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

Id. (quoting § 84-9-704) (Supp. 2001) (emphasis supplied).

The court determined that none of these transition rules "saved" the Bank's security interests in the debtors' growing crops. *See id.* The court concluded that the Bank's security interest in the Debtors' growing crops did not attach and was not enforceable because the the agreements did not describe the lands upon which the debtors' crops were growing. *See id.* The court concluded that "[b]ecause it was unenforceable before the enactment of revised Article in Kansas, it is unenforceable now. None of the transition rules addresses or cures the pre-enactment failure to attach." *Id.* The court granted the debtors' motion, stating that "the estate's interest in the proceeds of the crops planted prepetition is therefore free and clear of any lien or claim of the First National Bank of Sterling, Kansas." *Id.*

—Brandy L. Brown, Graduate Fellow, University of Arkansas School of Law

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